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No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

SUPERIOR FILMS, INC.,

Appellant,

vs.

DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, DIVISION OF FILM CENSORSHIP, CLYDE HISSONG, SUPERINTENDENT,

Appellee.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM JUDGMENT.

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BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM JUDGMENT.

I.

Appellee has filed its motion to dismiss the appeal of this case or in the alternative to affirm the judgment of the Supreme Court of Ohio. The grounds urged by appellee in

support of its motion will be discussed in the same order in which they appear in appellee's statement in opposition to appellant's statement of jurisdiction.

II.

1. The appellee claims that this court lacks jurisdiction of that portion of the appeal which asserts that the Ohio statute denies to appellant the equal protection of the laws for the reason that such issue was neither presented to nor decided by the Supreme Court of Ohio.

The amended petition of appellant, page 3, paragraph 1, alleges:

> "Plaintiff further says that said Ohio G. C. Sections 154-47—154-47i, and the order of September 16, 1952, pursuant thereto, on their face and as applied to ban petitioner's motion picture 'M' are repugnant to the First and Fourteenth Amendments of the Constitution of the United States, * * *"

On page 39 of appellant's brief filed in the Supreme Court of Ohio in discussing the statutes under consideration the following language appears:

> "Such a discriminatory measure also collides with the Federal Constitution. The equal protection and due process laws of the Fourteenth Amendment thereof forbids such state action." (citing **Grosjean v. American Press Co.**, 297 U. S., 233, 80 L. Ed., 660; **Hale, et al. v. Bimco Trading, Inc. et al.**, 306 U. S., 375, 83 L. Ed., 771, among others.)

When this issue was argued before the Supreme Court of Ohio, the fact that this motion picture, though banned by the Ohio Censor Board, could be legally broadcast from Ohio stations and shown upon the television screens of Ohio citizens elicited comment from Judge Zimmerman of that court.

While the Ohio Supreme Court did not see fit in its opinion to discuss the statutes in question from the aspect of want of equal protection of the law, there can be no question but that the issue was squarely before the court.

2. The appellee further claims that this court lacks jurisdiction of that portion of the appeal which attacks the license fee provisions of the Ohio statute as an unconstitutional tax for the reason that the judgment of the Supreme Court of Ohio on this portion of the appeal is based upon adequate and independent non-Federal ground. Although this issue was fully briefed and argued before the Supreme Court of Ohio, that court did not decide whether the system of licensing fees required by the Ohio act is an unconstitutional tax of property under the Federal Constitution, but disposed of the question by holding that the voluntary payment of the fee by appellant estopped it from questioning the constitutionality of the fee requirements. In this respect the Supreme Court of Ohio erred in so holding. Notwithstanding whatever other remedy may have been available to the appellant in the courts of Ohio to collect a fee paid or to enjoin the assessment of the fee, the fact remains that unless the license fee were in fact paid by the appellant, nothing whatever would be done by the Censor Board, and to have exhibited its motion picture without its submission to censorship, appellant would have subjected itself to criminal prosecution. The Supreme Court of Ohio overlooked the basic fact that when the questioned "fee" is a part of a licensing scheme which is in fact a tax upon the right of freedom of expression, the payment or non-payment of the fee, whether voluntarily or under protest, is entirely irrelevant to the question of whether the imposition of the tax is violative of the constitutional rights of appellant under the First and Fourteenth Amendments of the Federal Constitution. **Busey v. District of Columbia,**

138 Fed. 2d, 592 (C. A., D. C.); **Grosjean v. American Press Company**, 297 U. S., 233, 80 L. Ed., 660; **Murdock v. Pennsylvania**, 319 U. S., 108, 87 L. Ed., 1292; **Jones v. Opelika**, 319 U. S., 103, 87 L. Ed., 1290.

3. The appellee further urges that there is no jurisdiction of the remaining issues raised by the appeal for the reason that there are no substantial federal questions involved. The nature and substantial character of the federal questions involved in this case have been fully and adequately presented in the Statement as to Jurisdiction heretofore filed by appellant in these proceedings. The appellee seeks to minimize the substantial aspects of these questions by asserting that this court in the case of **Joseph Burstyn, Inc., v. Wilson**, 343 U. S., 495, 96 L. Ed., 687, has placed its stamp of approval upon the licensing statutes of Ohio. It is difficult to comprehend how such interpretation can be placed upon the language of the **Burstyn** case. Certainly the criteria of the New York statute under consideration in the **Burstyn** case were not comparable to those imposed by the Ohio statutes under consideration here, and neither can the decision in the **Burstyn** case be interpreted as an intention on the part of this court to approve and affirm that portion of **Mutual Film Corp. v. Industrial Commission**, 236 U. S., 230, 59 L. Ed., 552, not specifically reversed by the **Burstyn** case.

The decision in **Joseph Burstyn, Inc., v. Wilson**, supra, does not "acknowledge" the power of the State to impose a system of licensing and censorship on motion pictures, as contended by appellee. On the contrary, the question of "Whether a State may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films" was specifically **reserved** by this court, with the statement that the reserved question would present "a very different question from the one now before

us." This court expressed no opinion as to how it would resolve this "different" question, but cited two opposing lines of dicta, **Near v. State of Minnesota**, 283 U. S., 697, 716, 75 L. Ed., 1357, 1367; **Chaplinsky v. State of New Hampshire**, 315 U. S., 568. 571-72, 86 L. Ed., 1031, 1034-35, in favor of the proposition, and **Kovacs v. Cooper**, 336 U. S., 77, 82, 93 L. Ed., 513, 519, as opposed. This hardly reflects a disposition of the question in such a manner that it has become "settled law", thus depriving it of its substantial nature in this appeal.

This is the first opportunity which this court has had to consider the "reserved" question as well as the Ohio censoring statutes in the light of its decisions in the **Burstyn** case and in **Gelling v. Texas**, 343 U. S., 960, 96 L. Ed., 896, and that it should do so is manifestly important. See, in the case below, the dissent of Judges Taft and Stewart (159 O. S., 315, 336) appearing at page 11 of Appendix A of the Statement as to Jurisdiction filed by appellants herein.

Appellee further urges that since the Ohio statute is designed to exclude only such motion pictures which are obscene, immoral, or which tend to promote crime or riot, it therefore meets every requirement imposed by prior decisions of this court. Though appellee **says** that the design and effect of the statute go no further, the fact remains that the words of the statute do **not** limit the power of the state to excluding only that which is obscene, immoral or tends to incite crime or riot. Indeed, the scope of the power to exclude is without definable limit under this statute; and, the Supreme Court of Ohio said **nothing** which confines the state's power to such criteria. The unlimited discretion granted remains undisturbed. Thus in the second and third branches of the syllabus, which state the

law of the case as it shall be effective as the law of Ohio (Rule VI, Rules of the Supreme Court of Ohio, 94 O. S., reporter's note, page IX) the court held:

> "2. Legislative power is not delegated, and the guaranty of freedom of speech and the press of the First Amendment to the federal Constitution and Section 11, Article I of the Constitution of Ohio, is not violated, by Sections 154-47 to 154-47i, inclusive, General Code, creating a board of censors which is required to examine and censor prior to exhibition motion picture films intended to be publicly exhibited and displayed in the state, and to pass and approve only such films as are, in its judgment, of a moral, educational or amusing and harmless character."
>
> "3. The statutory criterion, for the examination and approval by the Division of Film Censorship of moving picture films for public exhibition in the state, that such films shall be of a 'moral, educational or amusing and harmless character,' is sufficiently clear, definite and comprehensive."

It is not necessarily what **has** been done, but what **can** be done under the Ohio statutes to restrict freedom of speech or of the press which renders the statutes void. **Thornhill v. Alabama**, 310 U. S., 88, 84 L. Ed., 1093.

All discussion of such matters touches upon the merits of this case, however, and not upon whether the appeal properly raises questions under the Constitution of the United States or whether such questions are substantial. This court considered identical questions to be substantial in the **Burstyn** and **Gelling** cases in which different statutory criteria were involved. The constitutional rights and privileges of appellant are no less important, real and substantial than were those of the appellants in the **Burstyn** and **Gelling** cases. Indeed, the instant case squarely presents the important undecided questions left open in those cases.

In all cases such as this, it becomes the duty of this court to examine the facts of the refusal of the license to determine whether the principles of the First Amendment have been honored. **Burstyn v. Wilson**, supra.

The appellant maintains that the principles of the First and Fourteenth Amendments as applied to it have been ignored by the Supreme Court of Ohio, and to correct this wrong this appeal is made.

Respectfully submitted,

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